

STATE OF HAWAII

Respondent.

94 DEC 20 P2:09

Que Sun Ostula
for John Ishihara

I.

FINDINGS OF FACT

The Commission hereby adopts and incorporates by reference Findings of Fact 1 thorough 38 and Appendix A of the Recommended Decision.

II.

CONCLUSIONS OF LAW

A. DISABILITY DISCRIMINATION

Under H.R.S. § 378-2(1), it is an unlawful discriminatory practice because of disability for any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment. The Recommended Decision analyzed whether Complainant had been discriminated against because of his disability under H.R.S. § 378-2 and the Hawaii Administrative Rules ("H.A.R."). The Recommended Decision relied upon case law interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., which prohibits employment discrimination by reason of disability, 29 U.S.C. § 794, as does H.R.S. § 378-2, and which uses the term "individual with a disability", 29 U.S.C. § 706(8)(A), with the same three part definition as in H.R.S. § 378-1. The Recommended Decision also relied upon Title VII case law interpreting the bona fide occupational qualification defense contained in H.R.S. § 378-3(2).

Respondent takes exception to the use of the term "disability" to characterize the discriminatory conduct because the events

occurred between 1989 and 1991 and the term "disability" was added in 1992. Respondent fails to note, however, that between 1989 and 1991, discrimination because of "handicapped status" was prohibited and the definitions for "disability" and "handicapped status" are identical. Thus, Respondent's exception does not affect the result of the case, and the Commission will use the current term "disability" instead of "handicapped status" to characterize the discriminatory conduct.

Respondent also takes exception to the use of the H.A.R.¹ on the grounds that the administrative rules were adopted in 1994 and are being applied retroactively to conduct which occurred between 1989 and 1991. Although the rules were designed to reflect the existing state law protections, the Commission will not apply the administrative rules to Respondent's conduct. To the extent that the Recommended Decision relied upon the H.A.R., the Commission does not adopt those portions of the decision. However, the Recommended Decision's analysis which relied upon case law under the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964 and concluded that Respondent discriminated against Complainant because of his disability in violation of Chapter 378, will be incorporated into the Final Decision. On pages 26 and 30 of the Recommended Decision the citation to H.R.S. § 378-3 is amended to H.R.S. § 378-2.

¹The Recommended Decision relied, in part, upon the H.A.R. because § 12-46-181 states that the rules "reflect[] the protections existing under state law protecting persons with handicapped status and is declaratory of existing law".

B. COMPENSATORY DAMAGES

For the violation of H.R.S. § 378-2, the Recommended Decision concluded that Respondent should pay Complainant \$40,000.00 in damages as compensation for injury to his feelings, emotions, mental well-being, personal integrity, and dignity. The Commission amends the amount of compensatory damages to \$50,000.00 because the loss of both civil service and contractual employment caused Complainant great stress, embarrassment, and loss of face. As a result of Respondent's unlawful discriminatory conduct, Complainant lost other job opportunities, could no longer support his family, and had difficulty paying the mortgage on his home. Having to live with the stress, embarrassment, and loss of face for three years justifies an increase in the amount of compensatory damages.

C. ORDER

With the exception of the correction of the citations to H.R.S. § 378-2, the non-reliance upon the administrative rules as the basis for concluding Respondent committed an unlawful discriminatory practice, and the increase in the amount of compensatory damages, the Commission hereby adopts and incorporates the Proposed Findings of Fact, Conclusions of Law and the Recommended Order as part of its Final Decision and Order.

DATED: Honolulu, Hawaii

DEC 20 1994



Amefil Agbayani, Chairperson

Daphne S. Barbee-Wooten
Daphne Barbee-Wooten, Commissioner

Josephine Epstein
Josephine Epstein, Commissioner

Jack Law
Jack Law, Commissioner

Richard Port
Richard Port, Commissioner

Note: Pursuant to H.R.S. § 91-14 any person aggrieved by a final decision and order in a contested case is entitled to judicial review by instituting a proceeding for judicial review within thirty days after service of the certified copy of the final decision and order.